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ABSTRACT

In March 1990, the Wisconsin legislature passed into law the Milwaukee Parental Choice Program. Its enactment made Wisconsin the only state in the nation with a private school voucher plan. Litigation concerning the constitutionality of the program has involved the following actions: (1) the Wisconsin Supreme Court refused to hear the case; (2) the Dane County Circuit Court ruled the law was constitutional on its face; (3) the Wisconsin Court of Appeals held the program violated the Wisconsin Constitution; and (4) the Wisconsin Supreme Court accepted the petition for review in March 1991. Arguments that have been raised during this process deserve further attention since they will be raised in similar situations across the nation. First, must there be a system of accountability to ensure that children who participate receive an adequate education? The choice program does not require that schools abide by the statutory minimum public school standards. Second, must all the students' individual rights be ensured? In the area of education of handicapped children, the County Circuit Court judge held that participating choice schools should not be obligated to provide an appropriate education for handicapped students who wish to participate. Finally, but foremost, if the answers to the first two questions are no, can choice programs square with the notion of public schooling traditionally held in the United States? (35 notes) (MLF)

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Education Issues

CHOICE
WISCONSIN STYLE

Julie K. Underwood

Wisconsin Center for Educational Policy
and
School of Education
University of Wisconsin–Madison

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September 1991

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Julie K. Underwood, J.D., Ph.D., is an Associate Professor in the School of Education at the University of Wisconsin–Madison and Co-director of the Wisconsin Center for Educational Policy. She currently serves as legal counsel for the Wisconsin Department of Public Instruction. Although the views expressed in this paper are her own, they are offered from her perspective as counsel for the state superintendent in the litigation discussed.

About the Center

The Wisconsin Center for Education Policy (WICEP) was established in 1990 as a center of the Robert M. La Follette Institute of Public Affairs and is funded by a 5-year grant. The Wisconsin Center for Education Research (WCER) provides additional support.

The purpose of the center is to contribute to improved education policy decisions in Wisconsin through research and dissemination of findings to policy makers and the public.

In addition to preparing a variety of policy papers and conducting educational policy workshops, WICEP will develop models and options for a system of Wisconsin educational indicators, a Wisconsin educational policy database, and enhanced analytic capability.

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CHOICE
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Introduction

The concept of educational choice[1] has captured the attention of the American public and public policy makers. The notion of funding private schools through public payment of tuition was first brought to public attention in 1955 by Milton Friedman.[2] As a method of introducing competition and free market forces into the educational system, thereby improving quality, Friedman advocated a system in which parents would receive a tuition voucher, which then could be redeemed at any public or private school.[3] Although the notion has had support,[4] it has not, until recently, caught fire. It has been called the "most prevalent reform idea of the 1990s,"[5] "the panacea" for educational reform,[6] and is an element of President Bush's "America 2000: An Education Strategy."

Statute

In March 1990, the Wisconsin legislature passed into law the Milwaukee Parental Choice Program, 119.23 Wis. Stat. Although the program had originally been introduced as a separate bill and had a hearing in the Urban Education Committee, the program was merged into the budget bill during the last days of the legislative session. Its enactment made Wisconsin the only state in the nation with a private school tuition voucher program. The program permits up to 1,000 low-income Milwaukee students to attend private, nonsectarian schools and pays participating schools about $2500 for each student participating. Funds for the private schools are taken from general school aids which would otherwise be paid to Milwaukee Public Schools.

Litigation

Wisconsin Supreme Court

On May 30, 1990, the state superintendent, Dr. Herbert Grover, was named as a defendant in a lawsuit filed in the Wisconsin Supreme Court by several Wisconsin citizens, the Milwaukee branch of the National Association for the Advancement of Colored People, the

Wisconsin Association of School District Administrators, and the Wisconsin Education Association Council. This original action asked the Supreme Court to hear arguments on the constitutionality of the Milwaukee Parental Choice Program. It raised the following issues:

1. The education clause of the Wisconsin constitution requires the state legislature to provide for schools which are "as nearly uniform as practicable." The plaintiffs argued that the Choice Program creates two categories of publicly funded schools—one which meets substantive educational quality standards and one which can set its own minimum standards.
2. The public purpose doctrine prohibits the state from spending public monies without public accountability. The plaintiffs argued that the Choice Program provides insufficient educational quality assurance from the private schools to satisfy this requirement.
3. The program was passed by the legislature as part of the budget bill. As a local program limited solely to Milwaukee, the plaintiffs argued that the Choice Program should have been the subject of a separate bill.

In this action, the state superintendent agreed with the plaintiffs—that the program was unconstitutional. The Attorney General, the only official legal representative of the state in court, believed the program was constitutional. The state superintendent asked the Governor to appoint special counsel so the Department of Public Instruction's (DPI) views on these issues would be represented. Requests were repeatedly denied, it being no secret that Governor Thompson is a strong proponent of choice. On June 26, the Wisconsin Supreme Court refused to hear the case in a 4-3 vote.

County Circuit Court

On June 25, 1990 the state superintendent was named as a defendant in a second action involving the Milwaukee Parental Choice Program. This action was filed in the Dane County Circuit Court by parents of potential students and a number of private schools who were interested in participating in the program. The plaintiffs argued that the DPI had exceeded its authority by requiring private schools to provide program, quality, and nondiscrimination assurances by signing a form in order to participate in the program. Judge Steingass allowed the plaintiffs from the Supreme Court case to join in the lawsuit

to defend DPI's administration of the program and to raise the issues presented in the Supreme Court.

In this action there were basically two issues: the constitutionality of the program and the extent of DPI's authority to administer the program consistent with other federal and state authority. In this action once again, the state superintendent's request for special counsel on the constitutional issue was denied. However, DPI's staff attorney appeared, and argued that the program was unconstitutional and that DPI had administered the program properly. The parties who were the original plaintiffs in the Supreme Court also argued that the program was unconstitutional, but implemented properly. The Attorney General's office argued that the program was constitutional and implemented properly. The plaintiff schools argued that the program was constitutional and implemented improperly. The Governor and some members of the legislature filed an amicus brief which defended the legislative process by which the bill was enacted. The Wisconsin Coalition for Advocacy (a group representing the interests of handicapped citizens) filed an amicus brief on the issues of discrimination and provision of an appropriate education for handicapped children wishing to participate in the program.

On August 6, 1991 Judge Steingass ruled that the law was constitutional on its face. Regarding the implementation, she agreed that the state superintendent has rights and duties to guarantee that participating schools meet the requirements both of the Choice statute and of other state and federal authority. However, she found that "he may not insist on compliance in a manner more onerous or demanding than that insisted upon for other participating programs and public schools." She characterized the Choice Program as a public program operating in private schools. As such, she found that the federal and state nondiscrimination requirements and individual rights attached. In the area of education of handicapped children, she held that since parents still had the option to choose the public schools, participating Choice schools should not be obligated to provide an appropriate education for handicapped students who wish to participate.

Wisconsin Court of Appeals

The plaintiffs in the original Supreme Court action filed an appeal in the Wisconsin Court of Appeals. The appeal dealt only with the constitutional issues. On November 13, 1990 the Wisconsin Court of Appeals held the program violated the Wisconsin Constitution. The court addressed only the question of the process through which the program was enacted by the legislature. It held that the statute was "'private or local' legislation that cannot constitutionally be passed as

part of a bill which embraces more than one subject." Thus the program could not constitutionally be enacted as a part of the budget bill. The court held the law was unconstitutional.

The plaintiffs asked the Wisconsin Supreme Court to review the case; this is a discretionary review. On March 6, 1991, the court accepted the petition for review and established a briefing schedule. Their decision appears to be only the next chapter in what has already been a complex and highly publicized process.

The program began in the fall of 1990. Almost 400 children enrolled in seven private schools. During the year, one school withdrew. One school closed due to financial difficulties. It withdrew from the program mid-year when the parents and school decided they wanted to reinstate their religious instruction. Shortly after withdrawal, however, the school closed due to financial difficulties. A second school filed for bankruptcy, but remains operating. All of the remaining participating schools enrolled students in the program in fall 1991. Sixty percent of the students participating in the first year returned to the program the second year. Pending a ruling from the Wisconsin Supreme Court, the program continues on a second cycle.

There are indications that the Milwaukee Choice Program will be redrafted in the 1991 session of the Wisconsin legislature. In fact, it is likely that the new bills will expand the program. A statewide non-partisan commission, The Commission on Schools for the 21st Century, has recommended the program be expanded to include three pilot programs in various parts of the state.

Clearly the Wisconsin experience has received abundant national attention both from proponents and opponents of private school choice. The end of the Wisconsin story will have great implications for the complexion of public education in the State of Wisconsin. Nonetheless, the process has had a great impact on other states regardless of the Wisconsin outcome. The arguments that have been raised during this process deserve further attention since they will clearly be raised in similar situations across the nation. In dealing with this, or other similar private school choice programs, the following recurring questions must be asked. First, must there be a system of accountability to assure that children who participate receive an adequate education? Second, must all of the students' individual rights, both statutory and constitutional, be assured? Finally but foremost, if the answers to the first two questions are no, can choice programs square with the notion of public schooling traditionally held in the United States?

Issues for Consideration

Accountability

Two of the state constitutional issues will be ones which occur in any state devising a private school choice program. The first is whether such a program violates the state constitutional provision regarding the implementation of public education, and the second is the manner in which the state may spend money through private entities. These issues focus on the extent of substantive educational regulations which must be imposed on the private schools. Although the issues in the Wisconsin litigation focus on Wisconsin constitutional provisions, every other state has similar provisions or restrictions. Opponents of the Choice Program argue that in order to receive public funding (i.e., be a part of the system of publicly funded education), the private schools must also comply with these minimum standards. Otherwise, the system is not uniform, as required by the Wisconsin Constitution.

The public purpose argument focuses on the extent of accountability which must be provided before the state may pay for services through a private entity. Generally, when the state purchases goods or services from a private organization, minimum specifications are set forth. The private provider must meet those specifications before the funds are spent. The question here is whether the legislature can transfer money to the private schools without prior assurances that the students will receive an education.

The education clause of the Wisconsin Constitution requires the state legislature to provide for schools which are "as nearly uniform as practicable."[7] This requirement has been consistently interpreted to mean that the instruction provided must be uniform in character, not that the schools or school districts must be unvarying.[8] Further, this requirement has been held to create a constitutional right to a uniform education to the children in the state.[9] The Wisconsin Supreme Court determined in 1989[10] that this meant that public schools were "uniform" if they met the minimum school standards set forth by statute.[11]

The Choice Program does not require that schools abide by the statutory minimum public school standards. The program requires only that the schools operate as private schools under the Wisconsin statutes and abide by one of four standards set forth in the statute.

In Wisconsin, regulation of private schools is *de minimis*. A private school need only certify that its program provides at least 875 hours of instruction each school year, and offers a sequentially progressive curriculum of fundamental instruction in reading, language arts, mathematics, social studies, science, and health.[12]

The Choice Program "quality assurances" provide no additional assurances. The only quality assurance contained in the program is that schools participating in the program must be operating as private schools, *and* meet *one* of the following standards:

1. At least 70 percent of the pupils in the program advance one grade level each year.
2. The private schools' average attendance rate for the pupils in the program is at least 90 percent.
3. At least 80 percent of the pupils in the program demonstrate significant academic progress.
4. At least 70 percent of the families of pupils in the program meet parent involvement criteria established by the private school.[13]

At least two of these standards are completely within the control and discretion of the private school itself. In order to fulfill the standards and remain in the program, a school need only to promote at least 70 percent of the participating students in its schools *or* have 70 percent of the families meet the school's own goals involving parental involvement. Arguably, a participating school could define parental involvement as answering telephone calls, having one conversation with the student's teacher a year, or signing a report card. If any one of these were the requirement for parental involvement set forth by the participating school, only 70 percent of the participating parents would have to meet even this goal to allow the school to remain in the program. Alternatively, a school could choose to meet the promotion criteria and promote 70 percent of the participating students. There is no assurance that these students be promoted justifiably or that their promotion to the next grade level would be based at all on academic achievement.

The regulation provided by the private school statute and the Choice Program does not assure an education. It may assure that some education is taking place so as to fulfill a parental obligation under the compulsory attendance statute but it may not be of a sufficient quality to incur state expense. Additionally, there is no assurance that the students will receive an education equivalent to that of other publicly funded instruction in the state. In essence, this creates two forms of public instruction, that which is publicly accountable for its services and that which is not.

Proponents of choice programs argue that sufficient regulation and control is given through parental control of the private schools. They contend that if students are not receiving an adequate education in a private school, parents will withdraw them. Thus any school with enough students to operate must be providing an adequate education.

This statement begs the question. To justify the expenditure of public money, sufficient safeguards should be in place to assure that the purpose will be achieved. Just because private schools offer a good education does not by itself assure that all participating schools will provide an education that justifies public funding.

Other proponents of the Choice Program argue that there need be no educational controls because the program is an experiment in providing education to economically disadvantaged youth. Who then protects the interests of the children if this experiment fails? What happens to the children who suffer by not receiving adequate instruction during this time? The result of not abiding by the standards set forth in the program is that the school may not participate the following year. This relief is only retrospective in nature, it will not help the child who did not receive services during the school year.

The drafters of the program contend it is narrowly drawn to address the problems of disadvantaged youth. However, nowhere in the program are these problems directly addressed. The needs of children in poverty-stricken urban districts are great—early childhood education, compensatory education, supportive services, exceptional education, dropout prevention programs, vocational programs, counseling services, nutritional services, etc. These problems are not specifically addressed in this program. The participating schools are not required to address these issues. There are no assurances that the severe problems facing disadvantaged youth will in any way be closer to being solved by merely changing either vendor or delivery systems.

Students' Individual Rights

As recipients of public tax monies to support the education of the participating children, the participating private schools should be required to provide the same guarantees students would have in other public placements. These are rights of children using public education; as stated by the United States Supreme Court, they should not be forced to "shed their rights at the school house gate."[14] Students should not be forced to choose between their individual rights and participation in a public program.

Public schools are subject to all of the restrictions and restraints placed on the state through the United States and Wisconsin constitutions. Students have the right to free exercise of religion,[15] freedom of expression,[16] freedom of association,[17] freedom against unreasonable search and seizure,[18] equal protection,[19] and due process.[20]

The Department of Public Instruction has an obligation to comply with a number of federal statutes. The State of Wisconsin and the Department of Public Instruction receive federal funds and are subject

to federal statutes. The Department of Education's regulations require compliance with Title VI of the Civil Rights Act of 1964,[21] Title IX of the Education Amendments of 1972,[22] the Age Discrimination Act,[23] and Section 504 of the Rehabilitation Act of 1973 in any state or state-administered program.[24]

Section 504 of the Rehabilitation Act of 1973 states: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity."[25] Under this statute, the State of Wisconsin, the Department of Public Instruction, and programs administered by the state or the DPI are prohibited from discriminating against handicapped persons.

The state has two obligations under Section 504: 1) not to exclude a person from participating in, or benefiting from a program it administers,[26] and 2) the State of Wisconsin and DPI must ensure that all handicapped students who are in publicly funded placements have an opportunity to receive a free appropriate education[27] as defined in the Education for All Handicapped Children Act (EHA).

This statute would be violated by denial of access into one of its programs to "otherwise qualified" handicapped persons. According to the Milwaukee Parental Choice Program, a student is qualified for participation in the program if he or she is a Milwaukee resident, meets the family income requirement, and has been enrolled in the Milwaukee public school or not enrolled in school during the 1989-90 school year.[28] Thus a handicapped child who meets these requirements must be allowed access to the program, and may not be denied the equal benefits of the program. In order to fulfill that obligation, the school must be willing to ensure that each handicapped student will still be offered a free appropriate education. If appropriate services are not currently available at the private school, they must find a way to offer these services to a handicapped student once that student enrolls in the school.

In sum, in order for a private school choice program to be implemented in compliance with Section 504, students who are otherwise qualified must be allowed to participate. Once they are enrolled in the program, they must be offered a free appropriate public education pursuant to all of the federal and state statutes and regulations regarding the education of handicapped children. If one looks at the program from the perspective of a handicapped student, the requirement of access and an appropriate education becomes apparent.

A fictitious child, John Jones, is a student in the Milwaukee Public Schools. He is also learning disabled; he has problems processing written information. In the Milwaukee schools he receives assistance

from a resource teacher who provides tutorial services and translates information from written to an oral form. The teacher also works with him to teach him to decode written work himself. For all other purposes he participates in the regular curriculum. The resource teacher and regular curriculum have been determined necessary and appropriate in order for him to achieve academically. Before J.J.'s learning disability was diagnosed, he was failing in his classes; he is now passing in the regular classes in which he is enrolled. J.J.'s parents want him to attend a participating private Choice school. They have chosen a particular Choice school because of its family and community focus. When the private school finds out that J.J. is learning disabled, they explain to his parents that they have no resource teacher for J.J., nor are they willing to provide one. J.J.'s parents know that without the appropriate educational services he will again fail in school. J.J. and his parents must then choose. Do they want to participate in the Choice program, taking advantage of the particular family and community focus that this school provides and allow J.J. to fail academically, or do they want to allow J.J. to remain in the Milwaukee public school and receive the services he needs to succeed educationally while forgoing the benefits the Choice school has to offer?

If Choice students have no Section 504 and EHA rights in the program, the dilemma is there, and the discrimination is blatant. They should not be forced to choose between two public benefits: participation in a Choice program and services they need to succeed educationally. A program which truly offers choices broadens alternatives; it does not limit educational opportunities.

Establishment of Religion

Consistent with the U.S. and Wisconsin constitutions,[29] the Wisconsin statute limits involvement to "nonsectarian private school[s]."[30] For the Choice Program to pass scrutiny under either the state or federal establishment clauses, it would have to show that there was a secular purpose, that the primary effect neither advanced nor inhibited religion, and that there are no excessive entanglements between church and state.[31] It has been noted that establishment of religion problems are heightened when applied to the especially sensitive area of elementary and secondary school children.[32]

In order to pass the constitutional scrutiny required, state funds may not pass directly to a religiously affiliated school. They may directly pass to secular, nonreligiously affiliated schools,[33] or to parents who then spend the funds at the religious school.[34] Currently the participating schools have all stated that they are not religiously

affiliated. Three of the participating schools, however, were religiously affiliated in the past and still are physically located adjacent to churches. An additional school withdrew from the program due to a desire to offer religious instruction. Although location alone won't make them religious in nature it may create an uncomfortable situation in the future if the state has to determine the extent of any current relationship between the private school and the church.

Conclusion

This program and others like it create a new form of public instruction. Legislatures have traditionally funded public education through the creation and funding of the "common school." The notion of the common school forwarded by Horace Mann was to be common, not in the traditional European sense of a school for commoners, but in terms of common to all people—something held in common. The common school "is not common, not as inferior . . . but as the light and air are common."[35] It is available to and equal for all, part of the birthright of the American child, for rich and poor alike. Its doors are open to all, no matter how easy or difficult their educational tasks might be.

Not only are these schools free of charge, but they also provide a level of education necessary to fulfill society's functions. They provide the education necessary to develop informed and productive citizens, who can actively participate in the democratic society. The common school has educated its citizens for active roles in society through instruction and interaction with others. In this common school, children of all creeds, classes, and backgrounds come together. Traditionally, it has been through the common school that our diverse, pluralistic society makes the many into one. Public education and public schools hold a special place in our republic, and as such, the institution of public education must be approached deliberately.

This is not to say that all education must be conducted within public school districts as we know them today. But when the legislature supports education with public funds, that education should at least meet the standards of the "common school." It should be held to standards that assure that the public funds are well spent. We ask no less when public funds are spent for other purposes, and we should ask no more when the legislature is spending public funds for the critical purpose of education.

When the legislature undertakes to create a new type of publicly funded elementary and secondary education, the guarantees of minimal instructional quality and guarantees of individual rights should

not be sacrificed. The children and parents involved in this program should be able to have confidence that if the state is endorsing the education through payment, the education they receive will meet minimal quality standards and will provide them the constitutional and statutory rights guaranteed in any public program.

Notes

1. The term has been variously used to include a wide range of plans. It has generally been used to refer to plans which allow for the public funding of private school tuition charges. Additionally, it includes plans that allow for intradistrict, interdistrict, or statewide choice of public schools.

2. Friedman, Milton, "The Role of Government in Education," *Economics and the Public Interest* (Robert A. Solos, ed., 1955). Also see M. Friedman, *Capitalism and Freedom* 85-108 (1st Edition, University of Chicago Press, 1962).

3. *Capitalism*, at 89.

4. See J. Coons and S. Sugarman, *Education by Choice: The Case for Family Control* (Univ. of California Press, 1978). An offshoot of choice vouchers, tuition tax credits or deductions received attention in the 1980s, e.g. H.R. 550 was introduced in the U.S. House of Representatives and was implemented in the state of Minnesota, see Mueller v. Allen, 463 U.S. 388 (1983).

5. John Witte, "Public Subsidies for Private Schools: What Do We Know and How to Proceed" unpublished manuscript (1991).

6. John E. Chubb and Terry M. Moe, "America's Public Schools: Choice Is A Panacea." *The Brookings Review*, No. 3, 4-12 (1990).

7. Article X, Section 3 of the Wisconsin Constitution provides in part that:

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for the tuition to all children between the ages of 4 and 20 years.

This is the education article of the Wisconsin Constitution. An education article is that state constitutional provision containing some statement about the state's role in public education. The articles vary among the states with some requiring the state to provide a "system" of free public education, and some qualifying the term "system" with phrases such as "thorough and efficient," "uniform," or "general and uniform." For a complete list and analysis of the interpretation of these terms see J. Underwood and W. Sparkman, "School Finance Litigation: A New Wave of Reform", *Harv. Jrnl. Law & Public Policy* (1991). For further discussion see M. McUsic, "The Use of Education Clauses in School Finance Reform Litigation," 28 *Harv. Jrnl. on Legislation* (1991).

8. E.g. *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 223 N.W. 123 (1928); *Kukor v. Grover*, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

9. *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

10. *Kukor v. Grover*, 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

11. Section 121.02, Wis. Stats. (also known as the twenty standards) states:

Each school board shall:

> (a) Ensure that every teacher, supervisor, administrator and professional staff member holds a certificate, license or permit to teach issued by the department before entering on duties for such position.
>
> (b) Annually, establish with school board employees a professional staff development plan designed to meet the needs of individuals or curriculum areas in each school.
>
> (c) Provide remedial reading services for a pupil in grades kindergarten to 4 if any of the following occurs:
>
> . . . .

(d) Operate a 5-year-old kindergarten program, except in union high school districts.

(e) Provide guidance and counseling services.

(f) 1. Schedule at least 180 school days annually . . . .

2. Annually, schedule at least 437 hours of direct pupil instruction in kindergarten, at least 1,050 hours of direct pupil instruction in grades 1 to 6 and at least 1,137 hours of direct pupil instruction in grades 7 to 12 . . . .

(g) Provide for emergency nursing services.

(h) Provide adequate instructional materials, texts and library services which reflect the cultural diversity and pluralistic nature of American society.

(i) Provide safe and healthful facilities.

(j) Ensure that instruction in elementary and high schools in health, physical education, art and music is provided by qualified teachers.

(k) . . . develop a written, sequential curriculum plan in . . . the following subject areas: reading, language arts, mathematics, social studies, science, health, computer literacy, environmental education, vocational education, physical education, art and music. The plan shall specify objectives, course content and resources and shall include a program evaluation method. . . .

(l) 1. In the elementary grades, provide regular instruction in reading, language arts, social studies, mathematics, science, health, physical education, art and music.

2. In grades 5 to 8, provide regular instruction in language arts, social studies, mathematics, science, health, physical education, art and music. The school board shall also provide pupils with an introduction to career exploration and planning.

3. In grades 9 to 12, provide access to an educational program that enables pupils each year to study English, social studies, mathematics, science, vocational education, foreign language, physical education, art and music. In this

> subdivision, "access" means an opportunity to study through school district course offerings, independent study, cooperative educational service agencies or cooperative arrangements between school boards and postsecondary educational institutions. . . .
>
> (m) Provide access to an education for employment program that has been approved by the state superintendent.
>
> (n) Develop a plan for children at risk under s. 118.153.
>
> (o) Annually, adopt and publish a performance disclosure report. The report shall describe the school board's and each school's educational goals and objectives, including learning-related performance objectives, and the results of the tests administered under par. (s) during the previous school year.
>
> (p) Comply with high school graduation standards under s. 118.33(1).
>
> (q) Evaluate, in writing, the performance of all certified school personnel at the end of their first year and at least every 3rd year thereafter.
>
> (r) Annually administer a standardized reading test developed by the department to all pupils enrolled in the school district in grade 3.
>
> (s) Using achievement tests that are aligned with the school district's curriculum, test all of the pupils enrolled in the school district in reading, language arts and mathematics at least twice in grades kindergarten to 5, at least once in grades 6 to 8 and at least once in grades 9 to 11. . . .
>
> (t) Provide access to an appropriate program for pupils identified as gifted or talented.

12. Sec. 188.165, Wis. Stat.

13. Sec. 119.23 (7), Wis. Stats.

14. *Tinker v. Des Moines*, 393 U.S. 503, 89 S.Ct. 733 (1969).

15. *West Virginia v. Barnette*, 319 U.s. 624, 63 S.Ct. 1178 (1943).

16. *Tinker v. Des Moines*, 393 U.S. 503, 89 S.Ct. 733 (1969).

17. *Healy v, James*, 408 U.S. 169 (1972).

18. *New Jersey v. T.L.O.*, 105 S.Ct. 733 (1984).

19. *Brown v. Bd. of Education*, 347 U.S.483 (1954).

20. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct.729 (1975).

21. 20 U.S.C. 2000d.

22. 20 U.S.C. 1681 -1682.

23. 42 U.S.C. 6101 et. seq.

24. 29 U.S.C. 794. 34 C.F.R. 76.500.

25. 29 U.S.C. 794 (a).

26. 34 C.F.R. 76.500.

27. 34 C.F.R. 104.33.

28. Section 119.23 (2)(a), Wis. Stat.

29. The first amendment of the United States Constitution prohibits any law respecting an establishment of religion. Article I, Section 18 of the Wisconsin Constitution prohibits "preference by given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies."

30. Section 119.23(2)(a), Wis. Stat.

31. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

32. *Ball; Aguilar v. Felton*, 105 S.Ct. 3232 (1985); *Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990).

33. *Aguilar v. Felton*, 105 S.Ct. 3232 (1985); *Mueller v. Allen*, 102 S.Ct. 3062 (1983); *Committee for Public Education v. Regan*, 444 U.S. 644 (1980); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 95 S.Ct. 1753 (1975); *Committee for Public Education v. Nyquist*, 413 U.S.756 (1973);

Levitt v. Committee for Public Education, 413 U.S. 471 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

34. *Mueller v. Allen*, 102 S. Ct. 3062 (1983).

35. Doane, Address, 15 *Am J. Educ.* 8 (1865). Quoted in K. Alexander, "The Common School Ideal," 28 *Harv. Jrnl. on Legislation* 356 (1991).